No. 15423

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DAVID SEYMOUR GRAVES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Statement of Jurisdiction.

Appellant was indicted by the Grand Jury for the Southern District of California on February 23, 1956. [Tr. R. 2-3.][1]

On March 5, 1956, appellant was arraigned on the charge in the indictment and on April 9, 1956, pleaded not guilty thereto. [Tr. R. 4.] Jury trial began on April 24, 1956, and was concluded by a verdict of guilty on April 25, 1956. [R. T. 3, 172.] After several requests for postponement by appellant, in order to liquidate his business, he was sentenced on September 24, 1956, at which

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[1]Tr. R. refers to the Clerk's Transcript of Record; R. T. refers to Reporter's Transcript of Proceedings; SSF refers to appellant's Selective Service File, Plaintiff's Exhibit 1.

time it was adjudged that he be committed to the custody of the Attorney General for a period of one year and one day. [Tr. R. 19.]

On September 24, 1956, the District Court ordered that appellant remain at liberty on his own recognizance pending the determination of his appeal. [Tr. R. 21.] A timely notice of appeal was filed on September 24, 1956. [Tr. R. 22.] On February 18, 1957, Chief Judge Denman ordered that appellant could proceed upon a typewritten record and typewritten briefs.[2]

The District Court had jurisdiction of this action under the provisions of United States Code, Title 50 App. Section 462(a).

This Court has jurisdiction under the provisions of United States Code, Title 28, Section 1291, and Rules 37 and 39 of the Federal Rules of Criminal Procedure, United States Code Annotated, Title 18.

Statement of the Case.

Appellant registered for the draft on July 18, 1950, and was classified II-C on May 23, 1951. [SSF 3.] He received a 1-A classification on March 10, 1954, which was sustained by the Appeal Board on May 14, 1954. [SSF 3, 13.]

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[2]Appellee received notice of appellant's Application for Leave to Proceed upon Typewritten Record and Typewritten Briefs on February 18, 1957, and notice that this Court had granted the Application on February 19, 1957. Appellee thus was unable to oppose the Application in time and to point out to the Court that although appellant had stated in his affidavit that he did not have the money with which to pay the costs of printing the record and briefs on appeal, the probation report in the District Court reflected that as of September 19, 1956 appellant's assets exceeded his liabilities by $15,050. *Cf.* SSF 112, 115.

On July 15, 1954, appellant was given a personal hearing before the local board at which time he was told that he must serve in the armed forces at some time and was therefore advised to make arrangements for the disposition of his bee business. [SSF 49.] When the board asked appellant when he would be in a financial position to go into the service, he replied he needed a year. [SSF 50.] The 1-A classification was continued on July 15, 1954, from which the appellant appealed. The Appeal Board again sustained the classification on September 2, 1954.

Appellant was given a pre-induction physical examination on November 23, 1954, and was found acceptable for military service. [SSF 68, 69, 81.]

On January 17, 1955, appellant came into the office of the local board and stated that he did not want to go into the service, among other things. He further advised the board that he could not enter the service until at least September, 1955. [SSF 83-84.]

On August 23, 1955, appellant was ordered to report for induction on September 8, 1955. [SSF 88.] Appellant requested a 30-day extension of that order. [SSF 89, R. T. 106, 109.] On August 30, 1955, appellant was informed that his induction was postponed until the October, 1955, induction call in order to give him the requested time to arrange his personal affairs. [SSF 91, R. T. 107, 149.] On September 15, 1955, appellant's mother wrote the local board requesting some action whereby appellant could continue to conduct his bee business, but this request was denied on the same date. [SSF 94-96.] In this letter, it was stated that "we have 2500 colonies of bees, three trucks with hoists, one warehouse with equipment." [SSF 94.] Thus the number of colonies

had increased from 2,000 in June, 1954, to 2,500 in 1955, during the time appellant had gained by his requested postponements for the purported purpose of liquidating his bee business. [SSF 38, 39.]

On September 23, 1955, appellant was ordered to report for induction on October 6, 1955, which order appellant admits receiving. [SSF 98, R. T. 110.] On October 5, 1955, some member of appellant's family and his attorney requested from a board member a further postponement of induction but the member stated that any further postponement must be up to the State Director. [SSF 99.] Appellant's counsel later advised the board the same day that appellant was not in town and could not be contacted. [SSF 100.]

On October 7, 1955, appellant's mother wrote the board advising it that "for the past five days" appellant had been in Bakersfield and that he was not aware that he had to report on October 6, 1955, due to a misunderstanding as to what a local board member had told them regarding a requested postponement. Appellant's mother then requested the board to adopt a plan whereby appellant could both operate his bee business and also engage in military training. [SSF 102-104.] On October 7, 1955, appellant's counsel wrote a letter to the board requesting a further postponement of one and one-half years. [SSF 105-106.]

On October 10, 1955, the board wrote a "final directive" to appellant's last known address ordering that he report for induction on October 13, 1955. [SSF 108.] Appellant failed to do so [SSF 120] since he did not return to his home until October 27, 1955. [R. T. 76.] Appellant never reported to the board or to the induction station or to the bus depot for transportation to said station. [R. T.

86-88.] However, his mother came into the local board on October 28, 1955, and requested a further deferment for her son, stating she was not going to have her home and family situation disrupted by the Army. [SSF 122.] At this point, she offered to let her younger son enter the service as a substitute for appellant. [SSF 122, R. T. 77-78.]

It was for the failure to report for induction on October 13, 1955, that the appellant was indicted.

I.

Appellant's Conviction for Failing to Report for Induction Was Proper.

A.

Appellant Was Under a Continuing Duty to Report for Induction.

Appellant received the Notice to Report for Induction approximately 14 days after the induction date of October 13, 1955. [R. T. 76, 119.] The jury was instructed that in order for appellant to have "knowingly" failed to report for induction, he must first have had knowledge of his duty to report and thereafter failed to report. [R. T. 168.] Appellant contends that such an instruction was erroneous. Appellant does not contend that there cannot be a "continuing duty" to report, but that the law as to continuing duty was not applicable to this case. (Appellant's Br. p. 30.)

32 C. F. R., Sec. 1632.14(a) provides:

> "When the local board mails to a registrant an Order to Report for Induction . . . , it shall be the duty of the registrant to report for induction at the time and place fixed in such order . . . Regardless of the time when or the circumstances under

which a registrant fails to report for induction when it is his duty to do so, it shall thereafter be his continuing duty from day to day to report for induction to his local board and to each local board whose area he enters or in whose area he remains."

It is also provided in 32 C. F. R., Sec. 1642.2:

"Continuing duty. When it becomes the duty of a registrant or other person to perform an act . . ., the duty or obligation shall be a continuing duty or obligation from day to day . . ."

No attack is made on these regulations which were the bases of the alleged erroneous instructions set forth at pages 17-19 of Appellant's Brief. Therefore, the validity of such regulations should herein be presumed. In any event, their validity has been upheld in *Silverman v. United States,* 220 F. 2d 36, 39 (C. A. 8, 1955), wherein it was stated:

"The nature of the offense charged is such that it may upon proper proof be a continuing one . . . The offense charged and proved was a continuing one. There was no error in so instructing the jury."

Cf. United States v. Sutter, 127 Fed. Supp. 109 (D. C. Calif. 1954).

Appellant's primary contention with respect to this matter, other than that there was insufficient evidence upon which to base the jury verdict, is that appellant had no "duty" to report on October 13, 1955, since he never had notice of the Order to Report until after that date. Thus, there never existed any duty which could "continue." As interesting as this theory is, it has a false premise, since it assumes that a registrant has no "duty"

to report unless he has knowledge of that requirement. As the above-quoted 32 C. F. R., Sec. 1632.14(a) provides distinctly, the duty of a registrant to report occurs *at the time* the local board mails an order to report for induction. Moreover, although actual knowledge thereof might be a requisite to criminal prosecution, the mere fact of mailing constitutes "notice" under 32 C. F. R., Sec. 1641.3, which states:

> ". . . The mailing of any order, notice, or blank form by the local board to a registrant at the address last reported by him to the local board shall constitute notice to him of the contents of the communication, whether he actually receives it or not."

Cf. United States v. McIntyre, 4 F. 2d 823 (C. C. A. 9, 1925).

Thus, the unchallenged regulations themselves provide the answer to appellant's contention that there was no duty which could continue. The regulations unequivocally state that appellant's duty to report arose upon the mailing of the order to report, and that thereafter, it remained his continuing duty to report. Once appellant had actual knowledge of his duty, and thereafter knowingly failed to report, the offense was complete.

The aforementioned *Silverman* case necessarily so holds, since the conviction therein was for failing to report for induction on June 8, 1951, even though Silverman did not receive said order, and had notice thereof only after said date. Therefore, it is clear that the instant appellant had a duty to report on October 13, 1955, and that if, as the jury so decided, he had knowledge thereafter of his duty and knowingly failed to perform it, he was guilty of the offense.

B.

Appellant Knowingly Failed to Fulfill His Continuing Duty to Report for Induction.

Although not pressed with vigor in his brief, appellant nevertheless has raised the question of the sufficiency of the evidence before the jury. (Appellant's Br. pp. 8, 30.) Some of the evidence is set forth below which the jury could have considered in concluding that appellant, after receiving notice on October 27, 1955, of his call to induction, knowingly failed to perform his continuing duty to report.

Appellant's mother testified that appellant received the order to report when he returned from Bakersfield on October 27, 1955, and that

> "I do remember distinctly David telling me he didn't want to go in . . ." [R. T. 143.]

Although he drove his mother to the office of the local board on October 28, 1955, appellant did not go inside when his mother therein requested a further deferment for him [SSF 122], for the reason that

> "Well, they had abused me so much, I just didn't want to see them again . . ." [R. T. 85.]

Appellant freely conceded that he made no further attempt to contact the local board except by an unsuccessful attempt to phone a board member, since he did not want to talk to the board anymore. [R. T. 86-87.] Further, appellant did not report to the induction station or to the bus depot for transportation thereto, after he received his order to report. [R. T. 88.]

The jury also could consider the appellant left San Bernardino about October 2, 1955, without notifying the

board of a change of address, even though he knew he was under orders to report for induction on October 6, 1955. [SSF 98, 102-104; R. T. 110.] In connection therewith, the jury also could consider that appellant had previously requested and obtained extensions of induction of one year and of one month in order to liquidate his bee business [SSF 49-50, 88, 98, 91], but had purchased 400 queen bees in late September or October, 1955, contemplating that he would be available to utilize them in his business during the Spring of 1956. [R. T. 105, 112-113, 123.] Therefore, it was reasonable for the jury to infer that appellant never intended to report for induction and that he knowingly refused to obey every order of the local board to do so.

Appellant's attitude towards military service and the attempts of the Selective Service System to draft him probably were revealed to the jury when he stated that he "might have" called the F.B.I. agents who arrested him a couple of gestapo agents, and told them that he had a business to maintain and that he would not be willing to report for induction without a warrant of arrest. [R. T. 9-10, 89-90.] When asked the ultimate question as to whether, on the day he drove his mother to the draft board on October 28, 1955, he was willing to submit to induction, appellant replied

> "How am I supposed to know how I felt then . . ." [R. T. 124.]

The jury had ample evidence before it sufficient to support their verdict of guilty. The fact that appellant's mother requested a further deferment for her son on the day he returned from Bakersfield cannot operate as a compliance with appellant's duty to report. Although his

mother participated heavily in the induction affairs of appellant, the one thing she could not do for him was to perform his duty of reporting for induction.

II.

Reception of the Selective Service File Into Evidence Was Not Error.

One of appellant's specifications of error is that the Court erred in admitting into evidence pages 119 through 122 of the Selective Service file on the grounds that the documents set forth on those pages were hearsay. Perhaps this alleged error is not urged too strongly in view of the lack of argument thereon, but in any event, the question will be answered by appellee.

Of course, most of what makes up a Selective Service file is pure hearsay, and appellant in his brief is not above making full use of such hearsay documents in support of his contentions that appellant was a "qualified and experienced beekeeper" in a "highly specialized work" which was helpful in the national defense by reason of the "use of beeswax in airplanes and for the rifling of big guns in 'mothballs.'" [Appellant's Br. p. 2; SSF 22, 26, 38 and 39.]

But one need not dwell too long on this facet of the case, since appellant's counsel later in the trial completely waived his previous objections [T. 6] to use of all the Selective Service file. [T. 132, 153.] At page 153 of the Reporter's Transcript, the following colloquy occurred:

> "Q. (Mr. Bevan): Let's refer to page 122, Mrs. Graves, of Exhibit 1 in evidence. I think you looked at this exhibit yesterday rather thoroughly. A. Oh, yes.

Q. With respect—

Mr. Tietz: I will object to the use of that in an effort to impeach the witness in that it is not what she said but it is what somebody else has put in here as their own impression.

* * * * * * * *

The Court: It is part of the record. It is all admitted in evidence.

Mr. Tietz: That proof should be brought in. The question is, your Honor, for what purpose it may be used.

The Court: It was not restricted at all. It was all admitted in evidence.

Mr. Tietz: Then whatever is in evidence may be used for argument to the jury?

The Court: Absolutely. That's right.

Mr. Tietz: Under those circumstances, I will let him have full leeway.

Mr. Bevan: You fully consent to having this file be used and having the jury use the file?

Mr. Tietz: Oh, certainly."

Since whatever objection was made in the court below was withdrawn, it cannot here be raised.

Touhy v. United States, 88 F. 2d 930, 934 (C. C. A. 8, 1937).

Cf. Fink v. United States, 142 F. 2d 443 (C. C. A. 9, 1943);

Crono v. United States, 59 F. 2d 339 (C. C. A. 9, 1932);

Buhler v. United States, 33 F. 2d 382 (C. C. A. 9, 1929);

Alvarado v. United States, 9 F. 2d 385 (C. C. A. 9, 1925).

III.

Appellant Was Not Entitled to a Judicial Review of His Classification Since He Failed to Exhaust His Administrative Remedies.

At the outset, appellant's argument with respect to the trial court's failure to submit instructions to the jury bearing upon the 1-A classification should be disposed of. If appellant did exhaust his administrative remedies, he would be entitled to raise the issue of erroneous classification, but only to a court and not to a jury. It is well-established that the question of whether a basis in fact existed for an alleged erroneous classification is one which must not be submitted to a jury.

Cox v. United States, 332 U. S. 442 (1947);

Reed v. United States, 205 F. 2d 216 (C. A. 9, 1953), cert. den., 346 U. S. 908;

Tyrrell v. United States, 200 F. 2d 8 (C. A. 9, 1953).

Therefore, no error was committed by the failure to give to the jury appellant's requested instructions.

Appellant's argument as to the arbitrary nature of the 1-A classification, given March 10, 1954, is that no basis in fact existed for changing appellant's II-C (agricultural deferment) classification given him on February 23, 1951. The importance of beekeeping, appellant says, is, *inter alia,* the use of beeswax in airplanes and cannons. The mere fact of the ending of the Korean hostilities on July 27, 1953, would appear to be sufficient reason for ending the exemption which is granted to a "registrant who is employed in the production for market of a substantial quantity of those agricultural commodities which are

necessary to the maintenance (*sic*) of the national health, safety or interest." (32 C. F. R., Sec. 1622.24(a); *Cf. Tyrrell v. United States,* 200 F. 2d 8, 12 (C. A. 9, 1953).)

However, further arguments as to the reasonableness of the classification will not be advanced, as that question never reached the trial court. It is well-settled, and not disputed herein, that in order for a registrant to be entitled to a judicial review of his classification, he first must have exhausted his administrative remedies.

Falbo v. United States, 320 U. S. 549 (1943);

Williams v. United States, 203 F. 2d 85 (C. A. 9, 1953);

Penor v. United States, 167 F. 2d 553 (C. C. A. 9, 1948).

The issue in the instant case is whether, in fact, appellant exhausted his administrative remedies. On October 23, 1954, appellant was given a preinduction physical and found acceptable for military service. [SSF 62-81.] Appellant was ordered to report for induction on October 13, 1955, which he failed to do. It is appellant's argument that his administrative remedies were exhausted as of October 23, 1954, since, being found acceptable, there remained nothing for the Army to do but induct him on the later date. If this contention be correct, a fundamental change in the concept of the induction process must have been worked by the preinduction physical examination procedure, since the law before such procedures were enacted required registrants to appear at the induction station before it was said that administrative remedies were exhausted.

As this Court very clearly stated in *Williams v. United States,* 203 F. 2d 85, 88 (C. A. 9, 1953):

> "Furthermore, as the Supreme Court pointed out in *Estep v. United States* supra, the Selective Service Act requires a selectee to come to the brink of induction before he may obtain a judicial review of his classification. He must . . . take the symbolic 'one step forward' which signifies that he has complied with all the steps in the selective process. *Only then will judicial review of an alleged violation of a selectee's constitutional rights by his local Board be available."* (Emphasis added.)

The case law and applicable regulations demonstrate uniquivocally, however, that no such change has occurred.

The question in *Billings v. Truesdell,* 321 U. S. 542 (1944), was whether a registrant who had reported to the induction station, had there undergone physical and mental examinations, but who had not undergone the ceremony of induction, was under a limited form of military jurisdiction. The Supreme Court said that he was not, and in doing so, shed considerable light upon the question before this Court. After his examinations at the induction station, Billings was found "acceptable" for service, and the Government contended that he became a soldier as of that time. The Court, however, pointed out the distinctions between a registrant who had been found "acceptable" and one who had been "inducted," analogizing to the then new regulations (not applicable to Billings) as to preinduction physical examinations which also provided, prior to induction, for one being found "acceptable."

"Moreover, the Selective Service Regulations have been amended in recent months so as to provide for preinduction physical examinations before a registrant 'is ordered to report for induction.' . . . Those found acceptable by the Army or Navy are later ordered to report for induction.

* * * * * * * * *

"We mention these recent regulations because they perpetuate the distinction between acceptance or being found acceptable and induction which appeared in the regulations when Billings reported at the induction station. That these amendments do not effect any change in the concept of induction is apparent from the fact that its definition has remained practically the same from the time when Billings reported at the induction station to the present time. *It could hardly be maintained that a selectee who has passed his preinduction physical examination but who has not been ordered to report for induction is subject to military jurisdiction.*

* * * * * * * * *

"Moreover, it should be remembered that he who reports at the induction station is following the procedure outlined in the *Falbo* case for the exhaustion of his administrative remedies. *Unless he follows that procedure he may not challenge the legality of his classification in the courts.*" (Emphasis added.)

The *Billings* decision plainly recognizes that a registrant is found "acceptable" by the Army after a preinduction physical examination—yet equally plainly states that such registrant nevertheless must report to the induction station in order to exhaust his administrative remedies so as to raise the issue of his classification in court. Appellant's argument that his acceptance by the Army on

October 23, 1954, constituted an exhaustion of his administrative remedies is in direct conflict with the utterances of the Supreme Court. If the dictum of *Billings* is to be set aside, it should be done by that Court, and no other.

This Court does not disagree with the foregoing statements in *Billings,* because in *Mason v. United States,* 218 F. 2d 375, 380 (C. A. 9, 1954), it was remarked:

> "Finally it cannot be argued that the provision for Mason's preinduction physical examination completed, at that stage, the administrative process of determining whether he shall be selected for military service. A similar argument was rejected in *Billings v. Truesdell* . . . The court there held that the regulations relating to a preinduction physical examination did not effect any change in the concept of 'induction.'"

The *Mason* decision was followed in *Kalpakoff v. United States,* 217 F. 2d 748 (C. A. 9, 1954), and *Francy v. United States,* 217 F. 2d 751 (C. A. 9, 1954). This Court has emphasized the importance of the process at the induction station and, impliedly, the importance of the registrant being there to exhaust his administrative remedies. *Chernekoff v. United States,* 219 F. 2d 721 (C. A. 9, 1955), contains the following language:

> "Appellant reported to the induction station as required by 32 Code Fed. Regs. §1632.14(a). He *thus* exhausted his administrative remedies . . . As 32 Code Fed. Regs. §1632.16 does not prescribe any method for induction, the Department of the Army has specified the procedure to be followed in Special Regulation 615-180-1.

"One purpose of this regulation is self-evident. It is intended to give a registrant a last clear chance to change his mind and accept induction rather than certain indictment and possible conviction for a felony . . .

"In the present case, the appellant was not given the prescribed step forward, nor the prescribed warning . . . it is highly important that the moment a selectee becomes subject to military authority be marked with certainty. It is also important that the moment he becomes liable for civil prosecution be marked with certainty . . .

"The ceremony is designed to bring about a definite responsive course of conduct by the selectee marking his separation from his civil status. This ceremony must be conformed to unless the selectee himself makes it impossible . . . or unnecessary . . ." (Emphasis added.)

Since Chernekoff was not given a definite opportunity to be inducted or refuse to be inducted at the proper time, the judgment of his conviction was reversed, even though Chernekoff, at the induction station, had made a written refusal to be inducted. Such being the importance of the culmination of the selective process, it stands to reason that the exhaustion of administrative remedies would require that the registrant go to the induction station even though it might be a foregone conclusion that he would be inducted there.

It is not necessary that the instant decision go that far, however, since appellant still might have been rejected for military service at the induction station. The Selective Service and Army regulations show this very clearly. With certain exceptions not herein pertinent, the appropriate draft procedures are set forth below.

Every registrant is given a preinduction physical before being ordered to report for induction. (32 C. F. R., Sec. 1628.10.) A Certificate of Acceptability is placed in the files of those registrants found acceptable for military service. (32 C. F. R., Sec. 1628.25(1).) Only those registrants found acceptable after a preinduction physical are selected to report for induction. (32 C. F. R., Sec. 1631.7.) Nevertheless, the selective process provides for the rejection of such "acceptable" selectees. For example, selectees who are rejected at the station must follow the armed forces instructions as to their return (32 C. F. R., Sec. 1632.14(b)), they are provided transportation and subsistence for their return trip (32 C. F. R., Sec. 1632.15 (e)), records of the rejections go into their files (32 C. F. R., Sec. 1632.20(a)(3)), and various other steps must be taken by the Selective Service System and by the armed forces concerning such rejected selectees. (32 C. F. R., Secs. 1632.20(b)(3), 1632.21(b), 1632.30.) The reasons for possible rejection of "accepted" selectees may be obtained from the Army Special Regulations governing induction procedures.

As appellant states in his Brief, the Army Special regulations in effect at the time of his induction-order date were the same as those set forth in *Mason v. United States, supra,* or Special Regulation 615-100-1. That Regulation stated:

> "As provided by SR 615-180-1, registrants found acceptable for military service or pre-induction examination and reporting for induction will undergo a physical inspection if the induction is accomplished within . . . a year in case of postponed registrants, after the pre-induction examinations."

As stated in the foregoing Regulation, Special Regulation 615-180-1 determines the procedures applicable to induction processing and physical inspection, and provides:

"17. *Scope of induction processing.*—Steps in processing acceptable registrants are listed below and normally will be performed in the order indicated.

"a. Reception of registrants and records.

"b. Induction orientation talk.

"c. Roll call and issuance of individual records.

"d. Physical inspection.

"e. Allocation to Army, Navy, or Air Force.

"f. The induction.

"g. Oath of allegiance ceremony.

"h. Outprocessing.

* * * * * * * *

"21. *Physical Inspection.*—a. Registrants found acceptable for military service on preinduction physical examination and reporting to an induction station for induction . . . will be medically processed by the examining physician as follows:

(1) Physical inspection.—Registrants will be given a thorough physical inspection, with all clothing removed, for contagious diseases, apparent defects, and intercurrent illness or injuries.

"21.c.(2)—For registrants found unacceptable on physical inspection.—In cases of registrants found unacceptable on physical inspection, the disqualifying defects will be listed under item 73 in order of seriousness, carrying the following heading: 'Disqualifying defects discovered upon inspection.' The following additional statement will be made under the same item: 'Unfit for military service.'

"27.f. Processing steps for registrants found unacceptable on physical inspection.—For registrants found unacceptable for military service on physical inspection, processing will be completed as follows:

* * * * * * * *

(6) Registrants will be directed to the transportation section where arrangements will be made for returning them to the appropriate Selective Service local boards. Every effort will be made to place the registrants on return transportation on the same day of their arrival at the induction station."

This, it is quite apparent that a registrant found "acceptable" after a pre-induction physical examination may be rejected at the induction station. Of course, it is not a registrant's actual physical condition which is important, but the fact that a change of physical condition might have occurred resulting in a rejection, which is of controlling importance. *Gibson v. United States,* 329 U. S. 338, 345 (1946). The rationale of the cases which require exhaustion of administrative remedies before seeking judicial relief is that the "selectee may still be rejected at the induction station." *Falbo v. United States, supra,* at p. 553. In view of the fact that appellant might still have been rejected at the induction station, the conclusion appears inescapable that he failed to exhaust his administrative remedies by not appearing there. Thus, the trial court did not err in its refusal to pass upon the question of whether appellant's 1-A classification had a basis in fact.

Conclusion.

This is not the ordinary case of a conscientious objector. Instead, the evidence at trial demonstrates that economic and not religious motives lay behind appellant's deliberate and brazen refusal to be inducted into the armed forces. Although appellant's absence from his place of address to which the orders to report for induction were sent, probably was a deliberate attempt to evade military service, no proof thereof was presented to the jury, except by way of the logical inferences they could draw from the evidence. Thus, the Government's proof in and theory of the prosecution were not bottomed on appellant's failures to report on October 6, 1955 and October 13, 1955, but upon the fact that appellant received actual notice of the latter order to report on October 27, 1955. Having been aware of the call to induction, appellant's refusal thereafter to take any steps toward submitting to induction was a violation of his continuing duty to report. By failing to report, appellant also waived any right he may have had to question in court his 1-A classification.

The judgment of the District Court should be affirmed.

Respectfully submitted,

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